In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1014

ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILLIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated,

Petitioners,

v.

CITY OF NEW YORK, & ORS., &c.,

Respondents,

and

FORDHAM UNIVERSITY, & ORS.,

Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR INTERVENOR-RESPONDENT WEBB & KNAPP LINCOLN SQUARE CORPORATION IN OPPOSITION

Of Counsel:

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	2
Statement	3
Argument	5
I—There are no substantial federal questions here involved	6
II—There is no conflict between the decision of the Court of Appeals in the present case and the decisions of this Court	9
Conclusion	15

CITATIONS

CASES:

Berman v. *Parker*, 348 U. S. 26 ..... 7, 8, 9

Burt v. *Pittsburgh*, 340 U. S. 802 ..... 7, 8

Cremer v. *Peoria Housing Authority*, 78 N. E. 2d 276 (Sup. Ct. Ill. 1948) 13

Everson v. *Board of Education*, 330 U. S. 1 .. 9, 10

Foeller v. *Housing Authority of Portland*, 256 P. 2d 752 (Sup. Ct. Ore. 1953) 13

Gohld Realty Co. v. *City of Hartford*, 104 A. 2d 365 (Sup. Ct. Errors Conn. 1954) 13

Kaskel v. *Impellitteri*, 306 N. Y. 73 (1953), *cert. denied*, 347 U. S. 934 7

McCollum v. *Board of Education*, 333 U. S. 203 .. 9, 10

PAGE

People v. *City of Chicago*, 414 Ill. 600, 111 N. E. 2d 626 (Sup. Ct. Ill. 1953) 12

State v. *Land Clearance, etc.*, 364 Mo. 977, 270 S. W. 2d 44 (Sup. Ct. Mo. 1954) 11, 12

U. S. ex rel. Tennessee Valley Authority v. *Welch*, 327 U. S. 546 ..... 7, 8

Velishka v. *City of Nashua*, 99 N. H. 161, 106 A. 2d 571 (Sup. Ct. N. H. 1954) 13

Zorach v. *Clauson*, 343 U. S. 306 ..... 9, 10

STATUTES:

Title 28 U.S.C. § 1257(3) 2

District of Columbia Redevelopment Act of 1945, 60 Stat. 790; D. C. Code, 1951, Title 5, §§ 5-701—5-719 ..... 8, 9

General Municipal Law of the State of New York, Section 72-k 12

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On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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Opinions Below

The opinion of the Supreme Court of the State of New York, New York County, Special Term (hereinafter referred to as "Special Term"), has not been officially reported, but is set forth at pages 200-207 of the record as printed for the court below. The Appellate Division of the Supreme Court of the State of New York, First Department (hereinafter referred to as the "Appellate Division"), unanimously affirmed without opinion the order and judgment of Special Term. See 170 N.Y.S. 2d 993 (not yet officially reported). The opinion of the Court of Appeals of the State of New York (hereinafter referred to as the "Court of Appeals") has not been officially reported, but is set forth in Appendix "B" to the petition herein.

Jurisdiction

Petitioners predicate the jurisdiction of this Court upon 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions which petitioners allege to be involved herein are adequately set forth in Appendix "A" to the petition.

Questions Presented

We believe that petitioners do not raise any substantial federal questions here and that all of the questions which they allege to be substantial have already been foreclosed by decisions of this Court.

We further believe that the decision of the Court of Appeals herein does not conflict with any decision of this Court.

Statement

Petitioners and certain others* (hereinafter collectively referred to as "plaintiffs"), business and residential tenants in the Lincoln Square area of the Borough of Manhattan in the City of New York, brought this action to enjoin the prosecution of the Lincoln Square Title I Urban Renewal Project (hereinafter referred to as the "Lincoln Square Project" or as the "Project") and to have certain actions of the Board of Estimate of the City of New York relating to the Project declared null and void.

The Lincoln Square Project envisages the reclamation and the redevelopment of a thirteen-block portion of the Lincoln Square area (hereinafter referred to as the "Project Area") and is divided into five component parts —the Collegiate Site, the Cultural Site, the Institutional Site, the Residential Site and the Co-operative Site. The Project is more fully described in the exhibits annexed to the answer of respondents (R. 82-102).**

Intervenor-respondent Webb & Knapp Lincoln Square Corporation (hereinafter referred to as "Webb & Knapp") is the redeveloper of the Project's Residential Site. As such redeveloper, Webb & Knapp will erect upon the Residential Site modern, fireproof multiple dwellings and related commercial facilities.

This action was commenced on December 2, 1957 by the service by plaintiffs upon respondents (hereinafter collectively referred to as the "City") of a summons, a complaint and an order to show cause. By the order to show cause, plaintiffs moved for a preliminary injunction restraining the City from acquiring the Project Area and for other relief.

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* Two of the original plaintiffs are not petitioners here.

** References are to pages of the record on appeal as printed for the Court of Appeals.

The City served an answer and moved to dismiss the complaint, for judgment on the pleadings and for summary judgment.

By orders consented to by all of the parties, intervenors-respondents Fordham University (hereinafter referred to as "Fordham"), the sponsor of the Project's Collegiate Site, Lincoln Center for the Performing Arts, Inc. (hereinafter referred to as "Lincoln Center"), the sponsor of the Project's Cultural Site, and Webb & Knapp were permitted to intervene in this action and to serve answers to the complaint.

Fordham served an answer and moved to dismiss the complaint and for summary judgment.

Lincoln Center served an answer and joined in the motions made by the City and by Fordham.

Plaintiffs then cross-moved for summary judgment.

Webb & Knapp served an answer, but its answer was not considered by Special Term on these motions.

After hearing thereon, Special Term entered an order which granted the motions of the City, Fordham and Lincoln Center to dismiss the complaint and for summary judgment and which denied plaintiffs' motion for a preliminary injunction and their cross-motion for summary judgment.

Plaintiffs then appealed to the Appellate Division from the order of Special Term. That appeal also brought up for review the judgment entered on that order.

The Appellate Division unanimously affirmed the order and judgment of Special Term and entered an order affirming that order and judgment.

Plaintiffs then appealed to the Court of Appeals from the order of the Appellate Division. That appeal also brought up for review the judgment entered on that order.

The Court of Appeals unanimously affirmed the judgment of the Appellate Division and entered an order affirming that judgment.

Plaintiffs then moved in the Court of Appeals for an order staying and enjoining the Lincoln Square Project pending the final disposition of this case by this Court. That motion was denied without opinion.

Petitioners then applied for an order from Mr. Justice Harlan staying and enjoining the Lincoln Square Project pending the final disposition of this case by this Court. That application is *sub judice* as this brief is written.

Petitioners then filed the present petition in this Court.

It is to be noted that only the redevelopment of the Collegiate Site by Fordham is alleged to be unlawful. Plaintiffs have in no way challenged any of the other four segments of the Project.

Argument

The briefs of the City and of the other intervenors-respondents adequately show that the decision of the Court of Appeals was correct and we believe that further argument on that point is unnecessary.

However, petitioners contend that, regardless of whether or not the decision of the Court of Appeals was correct, this Court should review that decision (a) because that decision involved substantial federal questions which this Court has not yet resolved (petition, pp. 13-20) and (b) because that decision conflicts with certain decisions of this Court (petition, pp. 21-23).

Accordingly, in this portion of our brief, we endeavor merely to meet those two contentions of petitioners. In Point I, we meet the first of petitioners' contentions. In Point II, we meet the second of petitioners' contentions.

I

There are no substantial federal questions here involved.

Petitioners assert that the decision of the Court of Appeals in the present case raises a number of substantial federal questions not heretofore resolved by this Court (petition, pp. 2-4, 13-20).

Petitioners base that assertion upon the ground that that decision improperly allows the sale of the Lincoln Square Project's Collegiate Site to Fordham, a religious institution, for less than the cost to the City of New York of the acquisition thereof. They allege (petition, pp. 14-15):

> "* * * (1) that the principles underlying the doctrine of 'separation between Church and State' prohibited the sale of part of that slum to a Roman Catholic institution at a negotiated price, approximately 3½ million dollars less than the price to be paid by the City (especially where two-thirds of the 3½ million dollar loss will be borne by the Federal Government), and (2) that as construed by the Court below, Title I of the 'Housing Act of 1949', 63 Stat. 413, as amended, 42 U.S.C. 1441, *et seq.* and section 72-k of the New York General Municipal Law are unconstitutional as being in violation of the First and Fourteenth Amendments, respectively."

In short, petitioners' challenge here is based upon the re-sale of a portion of a Title I project to a religious institution at a "writedown" from the cost of acquisition.

(a)

First, we submit that those federal questions are insubstantial because this Court has clearly indicated that the circumstances surrounding the re-use of a slum clearance area are irrelevant in determining the validity of the project.

Under Title I and similar statutes, land is condemned by a municipal agency to achieve the public purpose of slum clearance and then re-sold to redevelopers (see p. 11, *infra*).

In the present case and in prior cases, the courts of New York have held that a taking for slum clearance is in itself a taking for a public purpose, and that the nature of the re-use is immaterial.

Thus in *Kaskel* v. *Impellitteri*, 306 N. Y. 73 (1953), *cert. denied*, 347 U. S. 934, the Court of Appeals stated (306 N. Y. at 93):

> "Section 72-k of the General Municipal Law is drawn upon the basis, upheld in *Matter of Murray* v. *La Guardia*, that slum clearance is in itself a public purpose, which is separate and distinct from the objects to which the land may subsequently be devoted after being redeveloped by private capital. The State Constitution does not require that slums shall be rehabilitated exclusively by reconstruction for low cost housing, which is a different public purpose that may or may not be superimposed on slum clearance (*Matter of Murray* v. *La Guardia*, *supra*). Consequently, except where an applicable statute requires, the slum area may be cleared, replanned, reconstructed and rehabilitated according to any design and for any purpose which renders the area no longer substandard or insanitary."

Since this Court has never condemned as a violation of the Fourteenth Amendment a taking upheld by a state court as a taking for public uses in conformity with its laws, *U. S. ex rel. Tennessee Valley Authority* v. *Welch*, 327 U. S. 546, 552, the character of the re-use should similarly be irrelevant in this Court.

Our position finds further support in the decisions of this Court in *Burt* v. *Pittsburgh*, 340 U. S. 802, and *Berman* v. *Parker*, 348 U. S. 26.

In the *Burt* case, this Court affirmed on the authority of the *Welch* case, *supra*, the judgment of a three-judge District Court which refused to look beyond the condemnation of a slum area to the character of the re-use.

In the *Berman* case, this Court, in affirming the dismissal by a three-judge District Court of an action seeking to enjoin a Washington, D. C. Title I project, refused to look to the circumstances of re-use as a ground for invalidating the project. This Court stated that the object, slum clearance, was within the power of Congress as the local legislative body for the District and that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine" (348 U. S. at 33).

It should be noted that petitioners themselves recognize that "review [by this Court] may be unavailable because of *Berman* v. *Parker* * * *" (petition, p. 20).

(b)

Second, even if the circumstances surrounding the re-use of a slum clearance area are relevant in determining the validity of the project, we submit that the aforementioned federal questions are insubstantial in the light of the views expressed by this Court in *Berman* v. *Parker*, *supra*.

In the *Berman* case, this Court, in upholding the constitutionality of the District of Columbia Redevelopment Act of 1945,* clearly indicated that a religious institution may participate in a Title I project. The Court said of the Title I project there challenged (pp. 34-35):

> "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools,

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* 60 Stat. 790; D. C. Code, 1951, Title 5, §§ 5-701—5-719.

> *churches,* parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. * * * Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power" (emphasis supplied).

Since the Title I scheme in general, and the Title I project and the District of Columbia Redevelopment Act challenged in the *Berman* case in particular, inevitably involve a "writedown" re-sale to the participants therein (p. 11, *infra*), this Court's statements in *Berman* appear clearly to foreclose the contentions advanced by petitioners herein.

II

There is no conflict between the decision of the Court of Appeals in the present case and the decisions of this Court.

Petitioners assert that the decision of the Court of Appeals in the present case conflicts with the decisions of this Court in *Everson* v. *Board of Education*, 330 U. S. 1; *McCollum* v. *Board of Education*, 333 U. S. 203; and *Zorach* v. *Clauson*, 343 U. S. 306 (petition, pp. 21-23).

In those three cases, this Court ruled that cities and states may not subsidize religious institutions. In the *Everson* case, this Court, in upholding a New Jersey statute which authorizes local school districts to make rules and contracts for the transportation of children to and from parochial schools, stated (330 U. S. at 15-16):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can

> force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."

In the *McCollum* case, this Court, in striking down a "released time" program of the Champaign, Illinois, public schools, reiterated the language of *Everson* quoted above. In *Zorach*, this Court upheld a New York City "released time" program because it "involves neither religious instruction in public school classrooms nor the expenditure of public funds" (343 U. S. at 308-309).

Thus, the decision of the Court of Appeals herein can conflict with the decisions of this Court in the *Everson*, *McCollum* and *Zorach* cases, *supra*, only if there is here involved a governmental subsidy to a religious institution.

Throughout this action, petitioners have alleged that Fordham is a religious institution and that the City of New York and the federal government are subsidizing Fordham (a) because the Title I scheme necessarily involves a subsidization of its participants and (b) because of the particular facts relative to the participation by Fordham in the Lincoln Square Project.

However, we think it is clear, as hereinafter shown, (a) that a redeveloper does not receive a subsidy by participating in a Title I project and (b) that Fordham does not receive a subsidy by participating in the Lincoln Square Project.

(a)

The course of a Title I project is in barest outline as follows: A local public agency (e.g., a city) acquires a slum area; such agency then either sells (or leases), or clears and then sells (or leases), the area to a redeveloper either at a negotiated price or after a public auction, subject to re-use restrictions, with the difference between the cost of acquisition (or of acquisition and clearance) and the sales price paid by the redeveloper borne by such agency and by the federal government; the redeveloper then redevelops the area in accordance with a redevelopment or renewal plan embodying such re-use restrictions.

If a subsidy lurks anywhere in the Title I scheme, it can only lurk in the differential between the cost of acquisition (or of acquisition and clearance) and the subsequent resale price to the redeveloper.*

However, in passing upon slum clearance projects, state courts besides those of New York State have unequivocally held that the differential between the cost of acquisition (or of acquisition and clearance) and the resale price does not constitute a subsidy.

In *State* v. *Land Clearance, etc.*, 364 Mo. 977, 270 S. W. 2d 44 (Sup. Ct. Mo. 1954), the court, in determining that the redevelopment project there involved did not provide a subsidy, stated (270 S. W. 2d at 53):

> "It would be difficult to imagine a workable law that exacted more from a purchaser than a 'fair value' price. An exaction that the purchaser pay fair value cannot conceivably amount to a grant or subsidy. Both the statute and the undertakings of re-

* In their briefs to the courts below, plaintiffs alleged that a subsidy lurks in the Title I scheme solely because of this differential. Although petitioners do not state in their petition to this Court why they believe that the Title I scheme involves a subsidy, we assume that they still believe that this differential constitutes such subsidy.

> spondents pursuant thereto so clearly demonstrate that the purpose in acquiring the land is to rid it of its blighted and insanitary condition and to thereafter convey it to redevelopers for conversion to useful purposes in accordance with the redevelopment plan. The great weight of authority is that there is no private grant when land is cleared for the purposes herein contemplated and is thereafter sold at a loss, but for its then fair value."

The statute involved in *State* v. *Land Clearance* is substantially equivalent to Section 72-k of the General Municipal Law of the State of New York, the statute under which the Project Area was condemned and sold. If anything, the *Land Clearance* statute is less likely than Section 72-k to extract "fair value."

In *People* v. *City of Chicago*, 414 Ill. 600, 111 N.E. 2d 626 (Sup. Ct. Ill. 1953), the court, in upholding an Illinois slum clearance statute, stated (111 N.E. 2d at 636-637):

> "Plaintiff's assumption of a donation to Normandy Homes, Inc., the prospective developer here, is erroneous. Section 19 does permit the Commission to sell land in a project to a developer at 'use value.' This term is defined as 'the value at which the Commission determines such land should be made available in order that it may be developed or redeveloped for the purposes specified in the plan presented.' Sections 3(l) and 14 provide that the land for blighted vacant area redevelopment projects must be developed for predominantly residential uses. The 'use value' will thus be the value of the land, subject to restrictions placed upon it by the statute and the redevelopment plan. In this there is no donation of land to a private corporation, nor is there any loan of credit. The constitutional prohibition is not a bar to a municipality entering into a transaction where there is an exchange of consideration between the parties."

Similarly, in *Velishka* v. *City of Nashua*, 99 N.H. 161, 106 A. 2d 571 (Sup. Ct. N.H. 1954), the court, in upholding a New Hampshire slum clearance statute, stated (106 A. 2d at 575-6):

> "Section 5 of the act permits the housing authority to sell or lease the land in the project area 'at its use value' which may be less than the cost of acquisition, clearance and site improvements. The sale or lease to private enterprise is required to be made subject to conditions that will insure that the blighted or slum conditions do not return. * * * The sale or lease is not a gratuity since it is made at its use value as a means of assuring the redevelopment in accordance with the redevelopment plan. Cf. *Opinion of the Justices*, 95 N.H. 548, 65 A. 2d 700. There is no grant of public funds for private purposes in violation of the Constitution since the housing authority may sell or lease the land only at a use value and for uses which are consistent with the continuous use of the redevelopment in accordance with the original public purpose and plans."

See also, *Cremer* v. *Peoria Housing Authority*, 78 N. E. 2d 276, 284 (Sup. Ct. Ill. 1948); *Foeller* v. *Housing Authority of Portland*, 256 P. 2d 752, 767 (Sup. Ct. Ore. 1953) and *Gohld Realty Co.* v. *City of Hartford*, 104 A. 2d 365, 370 (Sup. Ct. Errors Conn. 1954).

In point of fact, the differential between the cost of acquisition (or of acquisition and clearance) and the sales price, far from being a subsidy, is merely an allowance to induce the redeveloper to undertake the obligations and to accept the restrictions imposed upon it under the redevelopment contract. Those obligations may include, as in the present case and in all other Title I projects in New York City, the relocation of residential tenants, the removal of commercial tenants and the demolition of existing buildings and structures, and always include the

construction of new improvements. The restrictions imposed require the redeveloper to use the land and the new improvements in accordance with the limitations set forth in the redevelopment or renewal plan.

As a result of the foregoing, what petitioners claim is a subsidy is rather a bargained-for equivalent which either arm's length negotiations or a public auction insures is not a subsidy.

(b)

In their arguments to the courts below, petitioners stated that, regardless of the propriety of the Title I scheme in general, Fordham, on the facts of the present case, receives a subsidy by its participation in the Lincoln Square Project and that the subsidy stems from the sponsorship contract between the City of New York and Fordham, from the condemnation of the Collegiate Site and from the restrictions imposed upon the redevelopment of the Collegiate Site.* Petitioners' brief in the Court of Appeals stated that "* * * [Fordham] is clearly benefited by the sponsorship contract * * *" (p. 30); that "[t]he use of the City's power of *eminent domain* * * * has conferred a real and substantial benefit to [Fordham] * * *" (p. 28); and that "[i]t is of course the reuse restriction itself which gave Fordham its principal benefit" (p. 31).

Clearly, Fordham does not on the facts of the present case receive a subsidy through the sponsorship contract. The only "advantage" which Fordham received therein was the assurance that the City of New York would sell the Collegiate Site to Fordham if it were the highest bidder (Exhibit B annexed to the affidavit of Robert Moses, R. 71). In no real sense was this a greater assurance than that granted to any prospective bidder at the public auction of that Site. Contrasted to this "ad-

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* Again, although petitioners are not clear on this point, we assume that this position is comprehended within the arguments set forth on pages 18-19 of the petition.

vantage" was the steep obligation imposed by the contract solely upon Fordham to bid at least $2,241,610 for the Collegiate Site.

Equally clearly, Fordham did not receive a subsidy by the condemnation of the Collegiate Site. The condemnation was an independent act of the City, legally unrelated to the Project. Certainly, the condemnation was not for Fordham. If anything, it was for the subsequent public auction and that auction was not held for Fordham's benefit.

Finally, Fordham does not receive a subsidy through the restrictions on the re-use of the Collegiate Site. Those restrictions require that that Site be used exclusively for educational purposes for a period of forty years (Exhibit B annexed to the affidavit of Robert Moses, R. 71). Because of those restrictions, only educational institutions could bid for that Site, but such a limitation upon the potential bidders for that Site hardly "subsidizes" any one educational institution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL I. ROSENMAN,
Attorney for Intervenor-Respondent Webb & Knapp Lincoln Square Corporation.

MAX FREUND,
JEROME L. SINDLER,
LAWRENCE B. BUTTENWIESER,
Of Counsel.

May 23, 1958.